Supreme Court, U. S.
FILED
SEP 16 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-506

OCTOBER TERM, 1974

DOYLE A. BOYD and

H. W. CALDWELL & SON, INC.

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals

for the Sixth Circuit

STANLEY H. SIDICANE
330 Stahlman Bldg.
Nashville, Tn. 37201

H. FRED FORD
325 Plus Park Blvd.
Nashville, Tn. 37217

Counsel for Petitioners

TABLE OF CONTENTS

Opinions Delivered in Courts Below 1

Jurisdiction 1

Questions Presented for Review 2

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 3

Argument 3

APPENDIX (Attached)

United States' Amended Complaint—Appendix I 5

Memorandum of the United States District Court for the Middle District of Tennessee—Appendix II 9

Opinion of the Sixth Circuit Court of Appeals —Appendix III 17

TABLE OF AUTHORITIES

Cases

Jones Towing, Inc. vs. United States, 277 Fed. Supp. 839 (USDC La. 1967) 4

STATUTES

28U.S.C. §2415 3
28U.S.C. §2416 3
33U.S.C. § 409 4

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1974

DOYLE A. BOYD and
H. W. CALDWELL & SON, INC. .
Petitioners
v.
UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals for the Sixth Circuit

Petitioners pray that a writ certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment of that court entered on June 18, 1975 in the above case.

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the Court of Appeals is unreported and is printed as Appendix II hereto.

The decision of the United States District Court for the Middle District of Tennessee is unreported and is printed as Appendix III hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1975.

Jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit is conferred on this Court under Title 28 U.S.C. Sec. 1254.

The portion of that section pertinent to the jurisdiction in this review provides as follows:

"Cases in the Courts of Appeals may be reviewed by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after retention of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW

1. Is the United States Exempt from any Statutes of Limitation in wreck removal cases under admiralty law?

STATUTES INVOLVED

28 U.S.C. §2415, 28 U.S.C. §2416

STATEMENT OF THE CASE

Sometime prior to July, 1966 and probably earlier, the barge CB-482 sank in the Cumberland River, near Nashville. The barge was purchased by H. W. Caldwell & Son, Inc. and entrusted to the defendant Doyle Boyd for safekeeping.

Thereafter during periodic surveys and barge inspections made by the Corps of Engineers, the sunken barge was noted.

The Corps allowed the barge to remain untouched for several years and beginning in 1969, the Corps began corresponding with one of the defendants, Doyle Boyd, asking his intentions about removing it.

Since Boyd did not take any action to remove the sunken barge, the Corps advised him, on July 7, 1970, to take no further action concerning it. Thereafter the Corps paid Gerard Construction Company to remove it, such removal being completed on or about May 21, 1971, some six years after its sinking.

On December 18, 1972, an action in the United States District Court was brought against defendant Doyle A. Boyd to recover the monies expended by the government. Thereafter, on April 16, 1973 the action was amended to add H. W. Caldwell & Son, Inc. as an additional defendant. The bringing of both actions occurred over 7 years after the barge had sunk. A copy of the amended complaint is appended hereto as Appendix I.

On February 4, 1974, the District Court entered a decision holding the defendants jointly and severally liable to the United States of America in the amount of $14,046.00 plus costs, and interest from June 21, 1971. The decision stated that defendants' plea of Statute of Limitations was inapplicable stating that the

Statute of Limitations began to run not when the United States became responsible for the removal of the barge 30 days after its sinking, but on the day the government ascertained the amount it expended to salvage the barge six years later. A copy of the District Court's decision is appended hereto as Appendix II.

Petitioners filed a timely appeal to the United States District Court of Appeals for the Sixth Circuit, which affirmed the action of the District Court, stating in part that the right to restitution did not accrue until "the actual removal of the sunken barge." The Court stated further that since the action was brought within two years of such ascertainment of the amount of the salvage costs, the right to restitution would not be barred by either the three year or the six year Statute of Limitations. A copy of the Sixth Circuit Court of Appeals' decision is appended hereto as Appendix III

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in holding that the Statute of Limitations did not run until the wreck had been removed involves an important question of Federal Law, which has not been, but should be, settled by this Court.

The decision of the Court of Appeals in this case conflicts with virtually every decision ever rendered by the Supreme Court of the United States and each and every District Court and Court of Appeals in that the law is well settled that the Statute of Limitations begins to run when the plaintiff knew, or with the exercise of reasonable diligence should have discovered his cause of action, not when the amount of damage is ascertained. In this case it is admitted that the Government knew of the sinking of the barge but did nothing for six years.

ARGUMENT

This case presents a unique question of law which has not been previously decided by this Court. That question involves a determination as to the time the Statute of Limitations begins to run in wreck removal cases of admiralty.

Since the enactment of Statute of Limitation against the United States Government (28 U.S.C. 2415, 28 U.S.C. 2416), the law has been almost uniform as to the time the statute begins to run. Never before has a decision been rendered by any Court allowing the government, or any party, to begin the Statute of Limitations running at the time of their own choosing.

Under admiralty decisions, abandonment by operation of law is

established 30 days after the sinking of a vessel. *Jones Towing, Inc. vs. United States*, 277 Fed. Supp. 839 (USDC La. 1967).

The Corps of Engineers, through the Secretary of the Army, has a duty following that thirty day period to light and mark a sunken vessel, or to remove it under the Rivers and Harbors Act 33 U.S.C. §409. Since the record in this cause establishes that the barge sank prior to July of 1966 and that the action against the defendants was not commenced until over 7 years later, it is clear that whether the three or six year statutes of limitation are applicable the action was barred as having been brought too late.

Although the wording in the Statutes of Limitation "after the right of action first accrues" has been interpreted numerous times to establish that "accrues" refers to the time after claimant discovered, or in the exercise of reasonable diligence, should have discovered its cause of action. both the district Court and the Court of Appeals for the Sixth Circuit ignored all existing law in upholding the right of the Government to bring the action initially at any time it chose, stating in essence that the Statutes of Limitation began running at the time it ascertained the exact amount of its damage. This is tantamount to allowing the Government to begin the running of the statute at will, since if it had waited twenty-five years to remove the barge instead of a mere seven, the statute would not begin to run until the time of the ascertainment of damage and removal twenty-five years later.

In summary, to uphold the decision of the Court of Appeals in allowing the United States to begin the running of the Statute of Limitation at its will is to open up a Pandora's box upon the legal world. This Court, as the Court of last resort, must prevent this decision from standing and eroding all existing law as it applies to the time the Statute of Limitations begins running in actions at law.

For all the reasons set out in the foregoing argument, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY H. SIDICANE
330 Stahlman Bldg.
Nashville, Tenn. 37201

H. FRED FORD
325 Plus Park Blvd.
Nashville, Tenn. 37217

Counsel for Petitioners

APPENDIX I
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA

Plaintiff

Vs. CIVIL ACTION NO. 6819

DOYLE A. BOYD, and
H.W. CALDWELL & SON, INC.,

Defendants

AMENDED COMPLAINT OF USA

1. This is a wreck removal case of admiralty and maritime jurisdiction as hereinafter more fully appears, and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

2. Plaintiff is the United States of America, a sovereign nation, which may bring this action pursuant to the original jurisdiction conferred upon this Court by 28 U.S.C. 1345.

3. Defendant Doyle A. Boyd is a resident of Nashville, Tennessee, residing at 3004 Lebanon Road, Nashville, Tennessee.

4. Defendant H. W. Caldwell & Son, Inc., is a corporation organized and existing pursuant to the laws of Tennessee, and listing as its agent for service of process Joseph A. Caldwell, 906 Freywood Drive, Madison, Tennessee 37115.

5. At all times pertinent herein, defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., were the owners and operators of the Barge CB-482.

6. Plaintiff United States of America in its sovereign capacity and according to the legislative direction of Congress maintains, protects and preserves as public property the navigable waters of the United States, among which is the Cumberland River.

7. On or about December 5, 1968, plaintiff United States of America through its Army Corps of Engineers was notified of a sunken barge owned by defendant Doyle A. Boyd lying partially

submerged in the navigable waters of the Cumberland River at Mile 192.1, near Nashville, Tennessee.

8. As owners of a sunken barge in a navigable channel, defendants Doyle A. Boyd and H. W. Caldwell & U.S.C. 409, were asked to commence the immediate removal thereof and diligently to prosecute such removal. On December 5, 1968, on February 7, 1969, and on June 12, 1969, plaintiff United States of America through its Army Corps of Engineers made formal demand upon defendant Doyle A. Boyd to remove the sunken barge.

9. Failure of the owner of a sunken vessel to remove her subjects the vessel to removal and disposal by the United States as an obstruction to navigation. On April 15, 1970, plaintiff United States of America through its Army Corps of Engineers made formal demand upon defendant Doyle A. Boyd to remove the sunken barge, giving notice that should Doyle A. Boyd fail to do so within 15 days after receipt thereof, the United States would undertake removal operations, reserving all rights to recover any and all costs and expenses incurred in said removal operations.

10. Upon the failure of defendant Doyle A. Boyd to comply with said demand, plaintiff United States of America through its Army Corps of Engineers advertised for bids for the removal and disposal of the obstruction to navigation caused by defendants' sunken barge. The contract was awarded to Gerard Construction, Inc., the lowest responsible bidder, and all work was satisfactorily completed on or about April, 1971, at a total cost to plaintiff United States of America of $15,126.12. Defendants Doyle A. Boyd and H. W. Caldwell and Son, Inc., have not made restitution of or reimbursement for this sum spent on their behalf and for their account despite due demand therefor and the said sum of $15,126.12 is still due and owing to plaintiff United States of America.

FIRST CAUSE OF ACTION

11. By reason of the foregoing matters, defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., have been unjustly enriched by reason of the United States assuming their statutory duty and defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., are therefore obligated to reimburse, indemnify and make restitution to plaintiff United States of America in the amount of $15,126.12, plus proper interest and costs.

SECOND CAUSE OF ACTION

As and for a second, separate and distinct cause of action against defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., plaintiff alleges and incorporates by reference the matter contained in paragraphs 1 through 10, as if specifically set forth herein, and, in addition thereto, further alleges:

12. By reason of the foregoing matters, defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., voluntarily and carelessly and negligently caused and permitted the barge to be sunk, and through their fault and neglect and the unseaworthiness of the said barge created an unlawful obstruction to the navigable capacity of the Cumberland River and a danger and menace to the navigation thereof, thereby causing damages to plaintiff United States of America in the amount of $15,126.12, plus proper interest and costs.

THIRD CAUSE OF ACTION

As and for a third separate and distinct cause of action against defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., plaintiff alleges and incorporates by reference the matter contained in paragraphs 1 through 10 as if specifically set forth herein, and, in addition thereto, further alleges:

13. By reason of the foregoing matter, defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., created and maintained an unlawful obstruction to the navigable capacity of the Cumberland River and a danger and menace to the navigation thereof and public nuisance which they wrongfully failed to remove and abate, and which was abated by the plaintiff United States of America at an expense of $15,126.12, for which defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., are obligated to reimburse and indemnify and make restitution to plaintiff United States of America in the amount of $15,126.12, plus proper interest and costs.

WHEREFORE, plaintiff prays:

1. That process in due form of law issue against defendants Doyle A. Boyd and H. W. Caldwell & Son, Inc., to appear and answer the allegations of this complaint;

2. That this Court enter judgment in favor of plaintiff United States of America against defendants Doyle A. Boyd and H. W.

Caldwell & Son, Inc., for the sum of $15,126.12 plus proper interest and costs;

3. That this Court may grant to plaintiff United States of America such other and further relief as may be deemed proper in the premises.

CHARLES H. ANDERSON
United States Attorney

By: /s/ IRA E. PARKER
Assistant United States Attorney

By: /s/ PATRICK C. TURNER
Trial Lawyer
Admiralty & Shipping
Section Department of Justice
Washington, D.C. 20530
Telephone: 202-739-3788

Attorney for Plaintiff
UNITED STATES OF AMERICA

APPENDIX II
IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

UNITED STATES OF AMERICA

Vs. CIVIL ACTION NO. 6819

DOYLE A. BOYD and
H.W. CALDWELL & SON, INC.

MEMORANDUM FILED FEB. 4, 1974

Plaintiff, the United States of America, seeks recovery of expenses incurred as the result of defendants' alleged failure to comply with their mandatory duty under 33 U.S.C. §409 to remove an obstruction to navigation, and the subsequent removal and disposal of the obstruction by the Secretary of the Army pursuant to his authority under 33 U.S.C. §414.

This is an admiralty and maritime claim under Rule 9(h) of the Federal Rules of Civil Procedure. This court has jurisdiction of this action under 28 U.S.C. §1345.

Defendant Doyle A. Boyd is a resident of Nashville, Tennessee, residing at 3004 Lebanon Road, Nashville, Tennessee. Defendant H. W. Caldwell & Son, Inc. is a corporation organized and existing pursurant to the laws of the State of Tennessee.

In this action for money damages brought by the United States, the applicable limitations period is provided by either 28 U.S.C. §2415 (a) or (b). Section 2415(a) provides for a six-year period of limitations in an action by the United States for money damages founded upon any contract express or implied in law or fact. Section 2415(b) provides a three-year limitations period in such actions founded upon a tort. Irrespective of which limitations period is applicable, this action is not barred. Removal and disposal of the sunken vessel was commenced on April 12, 1971. The initial complaint against defendant Boyd was filed on December 18, 1972. The amended complaint against both defendants Boyd and H. W. Caldwell & Son, Inc. was filed on April 16, 1973. The plaintiff United States of America did not have a right of action against defendants for the recovery of expenses incurred as a result of the removal of the sunken barge until the expenses had

actually been incurred. The removal and disposal was completed on May 21, 1971, and paid for on June 21, 1971. The court holds that the cause of action in this suit accrued on May 21, 1971, when removal was completed and the total costs of the removal were capable of ascertainment. Since both the complaint and amended complaint were filed within the respective six- and three-year periods of limitation provided in 28 U.S.C. §2415(a) and (b), the court holds that this suit is not barred by the applicable statutory period of limitations. *See United States v. Hartford Accident & Indemnity Company*, 460 F.2d 17, 19 (9th Cir. 1972), *cert. denied* 409 U.S. 979 (1972).

The Cumberland River is a navigable waterway of the United States and is navigable in interstate and foreign commerce. At Mile 192.1, near Nashville, Tennessee, the Cumberland River is approximately 564 feet in width. The Army Corps of Engineers maintains a minimum channel depth of nine feet from bank to bank at this point.

During the period of time involved in this action, 1963 through 1971, the Cumberland River at Mile 192.1 was used extensively for navigation purposes by both commercial and recreational vessel owners.

The sunken vessel in question, Barge CB-482, was an unregistered open hopper steel barge, measuring 175 feet in length, 26 feet in width, 11 feet in height, and with a draft (unloaded) of 1.5 feet. The letters and numerals "CB-482" were painted on the barge.

Sometime prior to 1963, H. W. Caldwell & Son, Inc. formed a marine division and employed Doyle A. Boyd as superintendent thereof. The arrangement between the company and Boyd provided that, in addition to a salary, Boyd would share in the net proceeds received from liquidation of the division.

In 1963, defendant Boyd, while in the employ of defendant H. W. Caldwell & Son, Inc. as superintendent of the marine division, purchased the Barge CB-482 on behalf of his employer for $515 from Steiner-Liff Iron and Metal company, Nashville, Tennessee. The barge became an asset of the marine division of H. W. Caldwell & Son, Inc.

After 1963 when the existing contracts of the marine division were completed, Boyd accepted work with other employers but with the general understanding that future contracts for the Caldwell marine division were a possibility and that he might return to work for Caldwell.

After defendant Boyd left the employ of defendant Caldwell, sometime after 1963, he continued to use the barge for his own

purposes, though title to the barge remained in defendant H. W., Caldwell & Son, Inc. The barge was entrusted to Boyd with the understanding that it would be available for use by both Boyd and the company.

Boyd subsequently had the Barge CB-482 towed to Mile 192.1 on the Cumberland River, where he moored the port side of the barge to the right bank of the river by attaching it by cables to some trees. He arranged with a local marina operation to occasionally pump out the barge. This pumping was necessary because rainwater would accumulate and swamp the barge regardless of whether the barge physically deteriorated in any way. The barge was pumped out on several occasions in 1965 and 1966. The Barge CB-482 sank at this location in approximately July, 1967, and its starboard side remained submerged until the barge was removed by the Army Corp of Engineers in 1971.

The Army Corps of Engineers first became aware of the barge's sunken condition in 1968. Thereafter, the District Engineer directed his personnel to determine the ownership of the barge and to request the owner to remove the barge from the river as a hazard to navigation. A representative of the Army Corps of Engineers thereafter interviewed an employee of the 1963 vendor of the barge, Steiner-Liff, and also interviewed the operator of the marina located near the barge. Both sources informed the Corps of Engineers' representative that defendant Doyle A. Boyd was the owner of the Barge CB-482.

On December 5, 1968, the District Engineer wrote to defendant Boyd and advised him of the provisions of the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq.*, with respect to sunken vessels in navigable waters.

On four more occasions between February, 1969, and April 1970, the District Engineer wrote to defendant Boyd, demanding that he remove the sunken barge as an obstruction and a hazard to navigation.

In July, 1969, personnel of the Army Corp of Engineers inspected the sunken barge and found a crack in the port side running from the gunwale to a point below the waterline, and through the inner and outer hulls of the barge. The depth of the Cumberland River on the sunken starboard side of the barge was sounded at 12 feet. At some time after the barge sank, it was inspected by defendant Boyd, who noted the existence of the crack in the barge's port side.

In May, 1970, the Army's District Engineer requested authority from the Chief of Engineers in Washington, D.C. to remove the barge as a hazard to navigation. The Chief of Engineers

granted such authority in June, 1970. In July, 1970, defendant Boyd was notified by the District Engineer that the Army Corps of Engineers intended to remove the barge as a hazard to navigation. Pursuant to advertisements for bids, Gerard Construction, Incorporated, after lawful bidding procedures, was awarded a contract by the Army Corps of Engineers for the removal and disposal of the sunken Barge CB-482. The contract was completed on May 21, 1971. Further, as a result of the sinking, the Army Corps of Engineers incurred expenses in the amount of $631 for the engineering, drafting and inspection work in connection with the removal and disposal of the wreck.

The position of the wreck was next to the right bank of the Cumberland River, and the sunken portion thereof was in 12 feet of water. The wreck was clearly within the navigable capacity of the Cumberland River. It was in an area subject to navigation by commercial and recreational vessels and was beyond doubt an obstruction to the navigable waters of the United States. Over the past few years the commercial and recreational use of the Cumberland River has increased substantially.

In addition to the above findings, the court hereby incorporated by reference as part of this Memorandum the Agreed Stipulation of Facts filed by the parties on August 15, 1973.

"§409. *Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels*

"It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels;. . . . And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise . . . it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title."

Section 414 of title 33, United States Code, reads:

"§414. *Removal by Secretary of the Army of sunken water craft generally*

"Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall

be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States."

Primary responsibility for the regulation and protection of navigable waters falls upon the Federal Government. It is for Congress to determine what regulations are necessary and proper to regulate and improve navigation. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). Pursuant to the power vested in it, Congress has delegated responsibility for the regulation and protection of navigable waters to the Secretary of the Army, 33 U.S.C. 1, and has enacted the Rivers and Harbors Act, 33 U.S.C. §401, *et seq*.

The Secretary of the Army, acting pursuant to statutory authority, 5 C.F.R. §301, has validly delegated to the Chief of Engi-

neers the authority to act on his behalf with respect to authorizing the removal of vessels as obstruction to navigation under the Rivers and Harbors Act of 1899. 33 C.F.R. §209.190.

The phrase "navigable channel," as used within 33 U.S.C. §409, is not limited to those deeper channels marked by buoys and used by larger vessels. *Red Star Towing and Transportation Co. v. Woodburn*, 18 F.2d 77 (2d Cir. 1927). A vessel may navigate at any part of a river containing navigable waters. *American Dredging Co. v. Calmar Steamship Corp.*, 121 F.Supp. 255, 263 (E.D.Pa 1954), *aff d.* 218 F.2d 823 (3rd Cir. 1955). Thus, the Barge CB-482, laying in a partially submerged condition adjacent to the bank of the Cumberland River, presented a hazard and an obstruction to users of the river and was correctly determined by the Army Corps of Engineers to be a hazard and an obstruction to navigation.

The right of the United States to require the removal of a wreck obstructing navigation, or to remove it and charge the negligent owners or operators therefor, was firmly set forth by the United States Supreme Court in the case of *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). In disagreeing with the contention that the Government could not lawfully recover removal expenses for the negligent sinking of a vessel, the Court stated:

> ". . . Petitioner's interpretation of the Rivers and Harbors Act of 1899 would ascribe to Congress an intent at variance with the purpose of that statute. . . . But our reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others. . . . We therefore hold that the remedies and procedures specified by the Act for the enforcement of §15 were not intended to be exclusive. Applying the principles of our decision in *Republic Steel*, we conclude that other remedies, including those here sought (recovery of removal costs), are available to the Government. . . . " 389 U.S. at 200,201.
>
> ". . . . Having properly chosen to remove such a vessel, the Unsited States should not lose the right to place responsibility for removal upon those who negligently sank the vessel." 389 U.S. at 204.

The teaching of Wyandotte is that those whose negligence caused the sinking and the obstruction of navigation are subject to the removal costs. Certainly, it applies to those whose concurring

negligence served to obstruct the navigable waters and cause the removal expense. In this case, we find that defendant H. W. Caldwell & Son, Inc., as owner, and defendant Doyle A. Boyd, as operator, were both negligent, and that such concurring negligence was the cause of the sinking of the Barge CB-482 and the obstruction of navigable waters and are thus jointly and severally liable for removal and disposal costs. *In Re Pacific Far East Line, Inc.*, 314 F.Supp. 1339, 1348, 1349 (N.D.Calif. 1970), *aff d.* 472 F.2d 1382 (9th Cir. 1973). Defendant Caldwell, as owner of the barge, was negligent in that it knew, or should have know, of the deteriorated condition of its barge and the fact that it had sunk, but took no action to prevent the barge from sinking or from becoming an obstruction to navigation. Defendant Boyd, as operator of the barge, was negligent in that he knew of the deteriorated condition of the barge and of the fact that it had sunk, but took no action to prevent the barge from sinking or from becoming an obstruction to navigation. Both defendants knew or should have known that, absent deterioration and absent "pumping out" the barge would sink.

The rights of the United States in navigable waters have been characterized as a "dominant servitude," *United States v. Commodore Park*, 327 U.S. 386, 390, 391, (1945), and all private property rights in the channel or stream bed are subject to it, *United States v. Kansas City Ins. Co.*, 339 U.S. 799, 808 (1950). The failure of the owner of a sunken vessel in navigable waters to remove it therefrom is considered an abandonment of the vessel by that owner, subjecting it to removal by the Army pursuant to its statutory responsibility for regulation and protection of navigable waters. 33 U.S.C. §409. It cannot then be said that where an owner has failed to remove a sunken vessel which obstructs navigation, and that vessel has been deemed abandoned by operation of law, that the later removal of the vessel by the Army constitutes an unlawful deprivation of the owner's property without due process of law. Further, notice to the owner of a wreck of the Army's intention to remove it is a discretionary matter, 33 U.S.C. §414, and failure by the Army to so notify the owner is neither arbitrary or unreasonable. *Zubik v. United States*, 190 F.2d 278, 281 (3rd Cir. 1951).

As to the counterclaim of H. W. Caldwell & Son, Inc. against the United States of America for allegedly negligently and unconstitutionally failing to notify the corporation of its duties and possible liability under federal law, the court holds in favor of the United States. The counterclaimant provides no authority for the proposition that an owner who abandons a sunken vessel in

owner would pump out the barge, but finally the barge sank, remaining submerged in the navigable portion of the river until it was removed by the United States in 1971. The date of the actual sinking is in dispute, District Judge Morton having fixed it as being in July, 1967, while appellants contend that it occurred in 1966. The actual date, for reasons which we will state below, is not material.

The United States first became aware of the barge's sunken condition some time in early 1968. It then made inquiries to determine the ownership of the barge, and both the previous owner, who had sold the barge, and the operator of the marina near where the barge had been tied up, advised the plaintiff that the owner was Boyd.

On December 5, 1968, the United States wrote to Boyd advising him of the provisions of the Harbor and Rivers Act, 33 U.S.C. §§ 401 *et seq.*, and especially as they pertain to vessels which were sunken in navigable waters. Four more letters were addressed to Boyd between February, 1969 and April, 1970, demanding that he remove the sunken barge, as it was an obstruction and hazard to navigation. As late as June 3, 1970, he advised the plaintiff that he intended to move the barge and use it as a dock. He was told to submit a plan for removal. The record is silent as to whether he actually did.

In July, 1970, Boyd was advised that he was to take no further action regarding the barge, and that it would be removed and disposed of by the Government following the submission of bids and the awarding of a contract. Bids were submitted and the contract was awarded, and the barge removed and disposed of May 21, 1971, with the contractor being paid $13,415 on June 21, 1971. The Government also claimed the sum of $631 for preliminary work done in connection with the removal and disposal of the boat.

The Government filed its suit for reimbursement of its expenses on December 18, 1972 against Boyd. Subsequently,

in 1973, Caldwell was made a party by an amended complaint. District Judge Morton entered his memorandum opinion after the trial of the action, finding that the United States was entitled to recover the amount of $14,046, with interest from June 21, 1971.

The first principal issue raised by the defendants was that the action was barred by 28 U.S.C. § 2415(b) which, in substance, provides that any court actions brought by the United States must be brought within three years after the right of action first accrues. Judge Morton held that the right of action did not accrue until May 21, 1971, when the total costs of removal were first established.

We believe that the pleadings, evidence and relevant statutes all must be examined, in order to determine whether the three year statute applies, or whether the six year statute set out in 28 U.S.C. § 2415(a), which pertains to any contract express or implied, in law or in fact, is applicable, or whether no statute applies.

Plaintiff's complaint alleges four causes of action. The first is based on the theory that the defendant failed to perform his statutory duty of removing the vessel, and that by reason of his failure, he was unjustly enriched by reason of the United States assuming his statutory duty and, therefore, he was obligated to reimburse and make restitution to the plaintiff.

The second cause of action is grounded in negligence, and the third cause of action is based on the theory that the obstruction constituted a public nuisance which the Government had removed and was entitled to be reimbursed for its removal. The fourth cause of action is not applicable to our determination of the issue.

Title 33 U.S.C. § 409 makes it unlawful to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels. It then states that whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it and to

maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the owner to so mark the craft is unlawful. The statute imposes the further duty on the owner to commence the immediate removal of the vessel and prosecute such removal diligently, with failure to do so being considered as abandonment of the vessel and, therefore, subjecting it to removal by the United States.

Title 33 U.S.C. § 414 specifically grants the United States the right to remove any sunken vessel or craft which constitutes an obstruction to its navigable waters and which has existed for more than 30 days. That statute also grants to the Secretary of the Army the right to give notice by publication in a newspaper published nearest to the locality of the obstruction.

The Supreme Court in *Wyandotte Transportation Company* v. *United States*, 389 U.S. 191 (1967), held that the United States had the right to remove vessels which had been negligently sunken in navigable waters and to recover the cost of removal from those who caused the sinking. The Supreme Court specifically referred to § 115 of the *Restatement of the Law, Restitution*, as furnishing a basis for the recovery of its cost. Section 115 states that:

> "A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefor, and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety."

The elements of this section of *Restatement* are complied with here, since the statute cited above, 33 U.S.C. § 401 *et seq.*, and more particularly §§ 409 and 414, impose a mandatory duty upon the owner of the sunken vessel to remove it, and

since such vessel represents a hazard to other vessels employed in navigation.

The right to restitution did not accrue in this case until the actual removal of the sunken barge, which occurred on May 21, 1971, and until the actual payment to the contractor, which occurred on June 21, 1971. Since the action was brought in December, 1972 against Boyd and in 1973 against Caldwell, it would not be barred by either the three year or the six year statute of limitations.

The appellants contend that if the Government is allowed to pursue the claim for recovery based on the time when it incurs its actual expense of removal, it could delay removal for many years and, thus, recover on a stale claim. The answer to this contention is that by doing so the Government would run the risk of exposing itself to liability to third parties under the authority of *Buffalo Bayou Transportation Company* v. *United States*, 375 F.2d 675 (5th Cir. 1967), and would also run the risk that the person responsible for the obstruction would be unavailable to respond in damages. Furthermore, if the Government should delay too long in removing the sunken vessel and then seek restitution, the owners of the sunken vessel could validly assert the defense of laches, inasmuch as laches would then be an equitable defense to an equitable cause of action, namely restitution.

In light of our decision that the plaintiff's cause of action is based in restitution and has a solid basis in that theory, we see no need to discuss the public nuisance theory which constitutes the third cause of action. We merely note that the Supreme Court, in dictum found in footnote 5 at p. 196 of its *Wyandotte* opinion, discussed the question of whether or not the United States had a nonstatutory public nuisance right which would form the basis for relief in cases involving the removal from navigable waters of sunken vessels which are obstructions thereto.

Boyd contends that the right of recovery extends only as against the owner, Caldwell. While it is true that 33 U.S.C.

§ 409 imposes upon the owner the duty to remove the sunken vessel, there is much evidence in the record to indicate that Boyd held himself out as an owner and clothed himself with the indicia of ownership with the acquiescence of Caldwell. Also to be noted is the fact that 33 C.F.R. § 209.410, cited in *Wyandotte, supra,* provides that a person who negligently permits a vessel to sink in navigable waters of the United States may be compelled to remove the wreck as a public nuisance or pay for its removal. Judge Morton correctly found that Boyd negligently permitted the vessel to sink in navigable waters, and hence we believe was correct in affixing joint and several liability against both Boyd and Caldwell.

Finally, we come to the question of "notice". In that connection, Caldwell contends that it received no notice of either the sinking of the barge or of its removal. While 33 U.S.C. § 414 indicates that the giving of notice by the Government is discretionary, see *Zubik* v. *United States,* 190 F.2d 278 (3rd Cir. 1951), we believe that Caldwell should be charged with notice, since it was the actual owner who permitted Boyd to have possession and control and all indicia of ostensible ownership. Furthermore, Boyd acknowledged ownership and all inquiries indicated that he was the owner. The District Court correctly concluded that notice to Boyd should be treated as notice to Caldwell.

Finding the other points raised by the appellants' briefs to be without merit, we affirm Judge Morton's judgment.